United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,328

DONALD DORSEY,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

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(Appointed by this Court)

February 5, 1968

QUESTION PRESENTED

Was the trial court's finding that the arrest was legal and the gun admissible in evidence clearly erroneous and reversible error in light of the inherent incredibility of the arresting officer's testimony?

I N D E X

TABLE OF AUTHORITIES

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,328

DONALD E. DORSEY,

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APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant, Donald E. Dorsey was indicted on one count of Carrying a Dangerous Weapon, D.C. Code, Section 22-3204 on September 27, 1966. Appellant was tried by the Court on July 13, 1967, and found guilty as charged. On August 11, 1967, appellant was sentenced to two to six years. An appeal was noted on August 21, 1967. Appellant has been and is presently in federal custody. The jurisdiction of this Court on appeal is proper under 28 U.S. Code § 1291.

STATEMENT OF THE CASE

On February 24, 1967, the Honorable Chief Judge Edward M. Curran heard and denied a motion to suppress evidence. On July 13, 1967, the Honorable Howard F. Corcoran denied a motion to suppress evidence and found appellant guilty of the count charged in the indictment.

The Arrest: Officer

Sergeant William R. Humphrey of the Ninth Precinct of the Metropolitan Police Department testified that "a little after five on the morning of September the 2nd, 1966," (Trial Tr. 6) while in an unmarked car observed appellant in conversation with a female in the 700 block of Seventh Street, S. E. Appellant is Negro, the female was white (T.Tr. 13). The officer followed the couple as they walked south on Seventh Street, though they were not violating the law (T.Tr. 12). He observed the couple talking and followed them because he "had not satisfied [him] self that this woman wanted to go with [appellant]." (T.Tr. 13). Occasionally the couple would stop momentarily and appellant would put his hand on her arm; they would talk; appellant would take his arm away and they would continue walking. Appellant "did not pull her." (T.Tr. 13).

The officer followed the couple to Seventh and Virginia Avenue, Southeast. Appellant spoke to the woman, left her alone and entered a building at 711 Virginia Avenue (T.Tr. 7). The woman waited for appellant. When appellant returned in a few minutes the officer followed appellant and the woman when they walked west on K Street to the 600 block.

The couple then walked into a parking lot on the south side of K Street at about 5:30 a.m. (Suppression Hearing Tr. 6). The lighting conditions were dark with street light illumination (T.Tr. 8). The officer testified that he saw the appellant trying the doors to several automobiles in the parking lot (T.Tr. 8). He did not say if the woman tried any doors. The couple walked across the street to another parking lot, "tried a couple more doors", and then got into a 1956 Dodge (T.Tr. 8), which was "apparently abandoned, because, as the officer testified: "I don't believe it had tags on it..." (T.Tr. 9,16).

The officer testified that at that time he got out of his car and approached the car where the appellant and his woman friend were sitting (T.Tr. 9). The officer was in uniform. He further testified what his purpose was in approaching the automobile:

Q. What was your purpose when you approached this automobile? What were you going to do, sir?

A. I was going to question him about ownership of the automobile because he had tried so many automobiles.

(T.Tr. 15).

The officer has never stated in the record that he approached the car to arrest appellant for tampering with an automobile.

He further testified that when he had gotten "almost to the door on the driver's side, the [appellant] got out of the car and faced [the officer] approximately two or three feet away..." (T.Tr. 9). The officer has given a couple of versions of how he seized the gun. In one version he could see something that looked like the butt of a pistol protruding from appellant's right rear pocket (T.Tr. 9,14,15). Appellant's shirt was hanging out of his pants and was long enough to cover his pocket, but it was not covering the pocket according to the officer, when he saw the gun butt (T.Tr. 19). In the version set out in the PD-163 as brought out at trial, the officer states that he saw and seized the pistol "upon further investigation." (T.Tr. 17, 18). The officer explicates his use of the phrase "upon

further investigation" in the PD-163 as "that was after I had seen it, then it was after the investigation." (T.Tr.18).

The officer did not testify that appellant made a move toward the gun:

> Q. Did he make any effort to either reach for it? Based on what you say, did he do anything other than get out of the automobile?
>
> A. His right hand was in the near proximity of his rear pocket. When I saw the butt of the gun, his hand was in the near proximity and I immediately seized it.
>
> (T.Tr. 20)

The officer then seized the pistol, a .32 caliber Omega revolver, and placed appellant under arrest. The officer then ordered the woman to get out of the car. He observed her intoxicated condition, and then placed her under arrest for drunkeness.

The officer did not charge appellant with tampering with an automobile, the offense which he says he observed (T.Tr. 15). The officer made no effort to get a complaining witness for a tampering charge (T.Tr. 16). There is some confusion whether appellant told the officer whom the car belonged to. At the suppression hearing the officer testified that appellant did not indicate who the car belonged to (S.Tr. 7). At trial the officer testified that

appellant had told him that the car "belonged to someone who lived in the building." (T.Tr. 16).

The Arrest: Appellant

Appellant testified that on the early morning in question he ran into a friend with a woman at 8th & K Streets, Southeast. The friend asked appellant to get the woman (whose name he later learned was Farrell) some liquor, because he had to get home. Appellant purchased the liquor at an after hours place and they went to Williams' automobile which was on a lot off of K Street to drink the liquor (T.Tr. 26). Appellant testified that he had met the man who owned the automobile at some parties. The friend and he had sometimes sat in the car and drank in the evening.

> About ten minutes later, the officer comes walking through the parking lot... he walks past the automobile and then he comes back. He said, 'What you doing sitting here this time of night?'
>
> "So, I said, 'we are just talking.'
>
> "He asked me, what's your name?" So I gave him my name.
>
> "He asked for my identification and then he said, 'Better still, get out.' So he tells the lady to stay inside. So, I get out.
>
> "So, he says, 'Put your hands up.' I put my hands up and he shakes me down. And he say, 'you have a pistol here.' And so he tells

me to stand up beside the car and put my hands over the top of the car." (T.Tr. 26,27)

Appellant testified that he had not tried to get in several other automobiles that night. He further testified that he did not get out of the automobile when the officer approached—only when the officer demanded that he get out. (T.Tr. 27)

Appellant stated that a friend had pawned the gun to him to get rent money; that he did not know how many bullets were in the gun; that he was carrying the gun to a friend's house at 413 Eye Street and was carrying it in his back right pocket (T.Tr. 28,29).

The Trial:

At the trial, the Honorable Howard F. Corcoran admitted the gun in evidence after a suppression type hearing and timely objection by counsel below. In making his ruling he stated that the arrest was legal (and presumably, therefore, the search).

STATEMENT OF POINTS

I.

The lower court's finding that the arrest was legal and the gun admissible was clearly erroneous and the conviction should be reversed, because the evidence could not support a finding that the arrest was legal.

II.

The gun introduced in evidence was inadmissible into evidence, because it was seized from appellant <u>after</u> he had been illegally arrested.

SUMMARY OF THE ARGUMENT

Appellant rests his appeal on three points:

(1) The lower court's implicit finding that the arresting officer's testimony was credible was clearly erroneous, and that therefore

(2) The arresting officer's testimony about appellant's car tampering and voluntary car exiting should not have been given credence.

(3) Assuming arguendo that the police officer's testimony is not credible on the crucial facts of the arrest, the officer did not have probable cause to arrest appellant when he ordered him out of the car and the gun seized was the product of an illegal arrest--therefore, inadmissible in evidence.

ARGUMENT I.

THE LOWER COURT'S FINDING THAT THE ARREST WAS LEGAL AND THE GUN ADMISSIBLE IS CLEARLY ERRONEOUS AND THE CONVICTION SHOULD BE REVERSED, BECAUSE THE EVIDENCE COULD NOT SUPPORT A FINDING THAT THE ARREST WAS LEGAL.

An appellate court has a broad scope of review over fact findings by a trial court which are unrelated to the exercise of trial court discretion.[1/] As Judge Wright in the Jackson case, supra, indicates, courts apply the "clearly erroneous" standard of Rule 52(b), Fed.R.Civ.P. in reviewing facts in such cases.[2/]

> "A finding is 'clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and grim conviction that a mistake has been committed."[3/]

In applying this standard the reviewing court may evaluate the credibility of the witnesses to the extent

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1/ Jackson v. United States, 122 U.S. App. D.C. 324, 326, 353 F.2d 862, 864 (1965).

2/ 122 U.S. App. D.C. 324, 326, 353 F.2d 862, 864, 865; Rule 52(b) provides: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the the credibility of the witnesses."

3/ 122 U.S. App. D.C. 324, 327; 353 F.2d 862, 865.

that credibility is not demeanor. Other factors in additon to demeanor are relevant to evaluating credibility--the witness' interest in the outcome, his reputation, internal inconsistencies in his testimony, degree of recall, and the likelihood of his testimony.4/

Appellant submits that an analysis of the arresting officer's testimony in the light of these factors will demonstrate the incredibility of the testimony. The officer's interest and knowledge in establishing a valid arrest necessitates careful scrutiny of his testimony. The officer's testimony itself is significantly inconsistent and contrary to common human experience.

The arresting officer in this case, Lieutenant Humphrey, was a sergeant at the time of the arrest. Although the record does not indicate how long he has been a police officer, it is safe to assume that he has been on the force for more than a few years. His interest in sustaining a good reputation should not be underestimated as a motive to exaggerate a few facts. This interest would be particularly relevant where the "technicality" of an arrest vis a vis guilt or innocence of the

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4/ 122 U.S. App. D.C. 324, 328; 353 F.2d 862, 866.

defendant are in issue. In addition, Lieutenant Humphrey's legal sophistication would facilitate a fairly expert exaggeration of the facts. Appellant submits that the probable bias and interest of this arresting officer necessitates an unusually close scrutinization of his testimony by the Court.

The officer's particular motive and bias in the facts in this case are extremely relevant. The officer admitted that he was following appellant and his woman friend even though he had no reason to believe that they were violating the law. Although the officer denies it (T.Tr. 13), an important reason for his surveillance must have been that appellant is Negro and the woman white. The officer's own justification for following them, in part, supports this conclusion: "... I had not satisfied myself yet that this woman wanted to go with him" (T.Tr. 13). Even if the officer could have reasonably had doubts about the woman's voluntary association with appellant, that doubt should have disappeared when appellant left the woman alone for a few minutes (T.Tr. 7) and she apparently waited for him to return. His doubts should have been allayed, yet he continued to follow them after appellant rejoined the woman. Does the officer have a legitimate police justification for

the surveillance or does the inter-racial nature have some relevance as a possible motive to "get something" on appellant?

There are other inconsistencies in the officer's testimony. The officer testified that he observed appellant trying the doors to several automobiles (T.Tr. 8). Yet he never charged appellant with tampering, a misdemeanor which the officer says was committed in his presence. He admits that the only reason he approached the car appellant was sitting in was to inquire about the automobile's ownership (T.Tr. 15). If he really did observe tampering, why was not the officer going to <u>arrest</u> appellant for tampering? Or was the tampering allegation just thrown in to give the officer a reason to approach the automobile?

Furthermore, if the officer's reason for approaching the car was to ascertain ownership, then why has he given two different versions of the answer to his inquiry? At the suppression hearing (S.Tr. 7) he testified that appellant "did not indicate who the automobile belonged to". At trial (T.Tr. 16) he said that appellant had said that the automobile "belonged to someone who lived in the building."[5/]

5/ The trial judge did not hear the pre-trial suppression hearing. The trial judge did not have a transcript of the

At trial the officer was not even sure that he asked appellant about ownership (T.Tr. 15). If the officer really had seen tampering and was going to inquire about ownership--an important point--why should his recall be so bad? Why did he not even attempt to obtain a complaining witness for a tampering charge? (T.Tr. 15)?

Another significant inconsistency is the officer's testimony about seizure of the gun. At trial he said that he could immediately see the gun butt in appellant's pocket when appellant got out of the car, i.e. he did not have to frisk (T.Tr. 9,14,15). Yet, on cross the officer admitted that in the PD-163 he stated that he discovered the gun "upon further investigation" after appellant got out of the car (T.Tr. 17,18). The PD-163 is a contemporaneous report of the arrest--not a statement made for purposes of a suppression motion. The phrase "upon further investigation" means something much different from "at which time I could see protruding..." (T.Tr. 9). The credibility of the officer's suppression hearing testimony about the gun seizure becomes more suspect when you remember that, by the

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pre-trial suppression hearing (transcribed January 11, 1968) and therefore was unaware of this and other inconsistencies between the two hearings which this Court has the benefit of. Cf. Jackson, 122 U.S. App. D.C. 324, 328, 353 F.2d 862, 866.

officer's own admission, appellant's shirt was hanging out of his pants and was long enough to cover the back pocket where the gun was found (T.Tr. 19).

In addition to the inconsistencies, is the testimony about appellant's voluntary exit from the automobile credible in light of common experience and knowledge. Why would appellant voluntarily get out of the automobile. There is nothing in the record to indicate that appellant intended to or attempted to pull the gun on the officer.[6/] Appellant knew he had a gun in his pocket. It is more reasonable to assume that he would sit tight and see what the officer wanted--wait until he was ordered out of the car--then get out voluntarily. Appellant had just begun to

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6/ Q. Did he make any effort to either reach for it? Based on what you say, did he do anything other than get out of the automobile?

A. His right hand was in the near proximity of his rear pocket. When I saw the butt of the gun, his hand in the near proximity (e.g. hanging at his side) and I immediately seized it.

(T.Tr. 20)

drink and there is nothing in the record to indicate that he was intoxicated. We, therefore, have no reason to believe that he did not have full control of his faculties. And, of course, we have appellant's own testimony that he was ordered out of the car.

An additional fact in this case, considered quite relevant in the Jackson case[7/] was the illegal arrest which occurred at the same time as the alleged legal arrest of appellant--the arrest of the woman Farrell.[8/] If the officer had really observed "tampering" by appellant--presumably with Farrell watching-- why not charge her with tampering or a related offense? It was only after the officer ordered the woman out of the car that he charged her with an offense which he then observed--after she was illegally arrested. Appellant submits that the actual modus operandi of the arresting officer's arrest procedures that night is further established by the woman's illegal arrest.

7/ 122 U.S. App. D.C. 324, 330; 253 F.2d 862, 868.

8/ Q. Did you say anything to the woman?

A. I asked her, after I placed the defendant under arrest, I asked her to step out and when she stepped out of the car, it became at that time to me obvious that she was drunk (T.Tr. 15).

ARGUMENT II.

THE GUN INTRODUCED IN EVIDENCE WAS INADMISSIBLE BECAUSE IT WAS SEIZED FROM APPELLANT AFTER HE HAD BEEN ILLEGALLY ARRESTED.

Assuming, arguendo, that the officer's testimony is found incredible, then this Court must reverse the trial court's ruling on the admissibility of the gun into evidence and the verdict because the search was the product of an illegal arrest.[7] The validity of the search turns on two points: the time of arrest; the arresting officer's knowledge at that time.[8]

If this Court finds that the officer's testimony that appellant voluntarily exited that automobile is incredible then it must find that appellant was ordered out. Appellant would have therefore been under arrest at the time when he was ordered out of the automobile. If, as the officer testified, the reason for approaching the automobile was to

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7/ The crucial determinations here are: Did the arresting officer observe appellant tampering with automobiles? Did the officer order appellant out of the automobile?

8/ Rios v. United States, 364 U.S. 253, 262 (1960); Kelley v. United States, 111 U.S. App. D.C. 396, 298 F.2d 310 (1961).

inquire about ownership, then there was no reason to order appellant out. Any investigatory questioning about ownership could have taken place with appellant sitting in the automobile. There is nothing in the record to indicate that the officer had any reason to fear for his safety from appellant and therefore a reason to frisk him for weapons. When the officer ordered appellant "to get out", appellant was in the custody and power of the officer.[9/]

The officer did not have probable cause to arrest appellant when he ordered appellant out of the automobile. Suspicion had not ripened into probable cause. In fact, there are very few objective facts in the record to justify even mere suspicion by the officer. Aside from the officer's incredible assertions (discussed in Argument I) that he had observed appellant trying car doors, all the record reflects that the officer knew was that he had followed appellant and

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9/ "In order for there to be an arrest it is not necessary that there be an application of actual force or manual touching of the body, or physical restraint which may be visible to the eye, or a formal declaration of arrest. It is sufficient if the person arrested understands that he is in the power of the one arresting and submits in consequence." Coleman v. United States, 111 App. D.C. 210, 218, 295 F.2d 555, 563 (1961) as cited in Kelley, supra.

a woman to a car; saw appellant go in and out of an after hours "bootleg" place; and, observed appellant in a car with a flat tire and no tags on it. Neither the officer or appellant's testimony reflects any additional information concerning probable cause learned by the officer when he approached the car appellant was sitting in. Appellant submits that he was illegally arrested when he was ordered out and the search disclosing that gun was therefore illegal.

CONCLUSION

Appellant prays that this Court reverse his conviction and enter a verdict of not guilty, or, in the alternative, to reverse and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief has been personally served at the Office of the United States Attorney United States District Courthouse, Washington, D. C. this 5th day of February, 1968.

Lawrence H Schwartz
LAWRENCE H. SCHWARTZ

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,328

DONALD E. DORSEY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID G. BRESS,
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FRANK Q. NEBEKER,
THEODORE WIESEMAN,
ROGER E. ZUCKERMAN,
Assistant United States Attorneys.

Cr. No. 1118-66

QUESTION PRESENTED

In the opinion of appellee the following question is presented:

Were the decisions of Judges Corcoran and Curran, as triers of fact, to believe Officer William Humphrey's description of the events surrounding appellant's arrest and to disbelieve appellant's description of those events "clearly erroneous" where

(a) the testimony of Officer Humphrey was reasonable and comported with common and ordinary experience, and
(b) where appellant's own testimony was suspect and replete with inconsistencies, and
(c) where appellant had previously been convicted of several offenses, the nature of which reflected adversely on his propensity for truth-telling?

INDEX

TABLE OF CASES

OTHER REFERENCE

* Cases chiefly relied upon are marked by an asterisk.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,328

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v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was charged by indictment with carrying a pistol without a license in violation of 22 D.C. Code § 3204. Before District Court Judge Edward M. Curran on February 24, 1967 appellant was unsuccessful in his attempt to suppress a gun seized on his person at the time of his arrest. After a trial before District Court Judge Howard F. Corcoran on July 13, 1967, at which appellant waived his right to a jury, appellant was found guilty as charged. He was sentenced to a term of imprisonment of from two to six years.

The motion to suppress hearing and the trial disclosed the following. Officer William R. Humphrey, the arresting officer, testified that he first encountered appellant in the company of a female in the 600 block of Seventh Street, S.E. at 5:00 a.m. on September 2, 1966, during routine police patrol in an unmarked vehicle (T. Tr. 6). Officer Humphrey's attention was directed to appellant because it appeared the female was being restrained in her movement by appellant (T. Tr. 6, 13).[1] Appellant and the female walked down Seventh Street. Officer Humphrey watched as, after a short stop, appellant entered a bootleg liquor store at 711 Virginia Avenue, S.E. (T. Tr. 7). He came out two or three minutes later and he and the female walked to the 600 block of K Street, S.E. (Tr. 7).

Officer Humphrey saw appellant and his female companion walk onto a parking lot where appellant began trying several automobile doors. Not finding any open, appellant crossed the street and tried several there. Finally he opened the door to a 1956 Dodge. Appellant got in the operator's side and the female next to him. (T. Tr. 7, 8, 9; M. Tr. 6). Officer Humphrey stopped his squad car, got out and approached appellant intending to ask appellant about the automobile (T. Tr. 9, 16; M. Tr. 7, 8). As he was approaching the car on foot, Officer Humphrey could see that the car was without license tags, that it had several broken windows and had several flat tires. It

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[1] Appellant's intimation of a racial motive for Officer Humphrey's surveillance in his factual statement (at 2) and later in his brief (at 12) is unsupported by the record. The sole mention of race during the entire proceedings occurred early in the trial when counsel for appellant asked Officer Humphrey the following question:

> Q "Isn't it a fact that one of the factors involved in your mind was the fact that this was a white woman and this defendant was a Negro?"
>
> A "No, sir."

Violet Farrell, the woman to whom the question referred, was never present during trial. Surely it is elementary that Officer Humphrey's negative answer to trial counsel's question is *insufficient* grounds on which to base the assertion that Violet Farrell was a white woman.

looked abandoned. Just as he reached the car, appellant of his own volition got out and faced Officer Humphrey at a distance of some two or three feet. (T. Tr. 9; M. Tr. 6, 7). Officer Humphrey was clear that he had said nothing to appellant prior to this point. Appellant was wearing a shirt pulled out at the waist. (T. Tr. 9, 14; M. Tr. 7). As appellant got out of the car, his shirt pulled over his waist revealing to Officer Humphrey the butt of a pistol protruding from appellant's rear pocket (Tr. 9, 14-15, 17; M. Tr. 8). Officer Humphrey seized the pistol and placed appellant under arrest (T. Tr. 9, 18; M. Tr. 7, 8). Officer Humphrey further testified that appellant's hand was in the "near proximity" of the gun when he seized it (T. Tr. 20). Officer Humphrey subsequently arrested appellant's female companion for being intoxicated (T. Tr. 10, 11).[2]

Appellant related the events surrounding the arrest as follows. He had just left his girlfriend's apartment at approximately 4:30 a.m. when he came across his friend and a female companion at Eighth and K Streets, S.E. Appellant at the motion to suppress hearing testified that his friend whom he met was in a hurry because "he said he was going to work" (M. Tr. 19). At trial appellant related that his friend was in a hurry "cause he had to go home to his wife" (T. Tr. 26). The girl wanted a drink and appellant, in order to "do a favor" for her—although he didn't know her—agreed to take her to a local bootlegger (M. Tr. 15, 19, 20).

From there, appellant testified, he and the female, one Violet Farrell, proceeded to an automobile in the 600 block of K Street, S.E. (T. Tr. 26; M. Tr. 15). Miss Farrell carried the bottle of liquor in her bosom (M. Tr. 16). At the motion to suppress hearing appellant identified the car

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[2] The sole inconsistency in Officer Humphrey's testimony involves post-arrest statements made by appellant as to the ownership of the car. At the motion to suppress hearing, Officer Humphrey testified appellant told him nothing about the car's owner after the arrest (M. Tr. 7). At trial, Officer Humphrey testified that appellant had mentioned that the car belonged to someone in a nearby building (T. Tr. 16).

as belonging to one "Richard" whose last name he did not know and who lived in a nearby apartment house (M. Tr. 16). At trial appellant identified the automobile as belonging to one "William", and was again unable to state his last name (T. Tr. 26, 30). At the motion to suppress hearing, appellant testified that prior to his arrest he had had nothing to drink, Miss Farrell not yet having opened the bottle when Officer Humphrey arrived (M. Tr. 12). At trial, however, appellant testified, "we gets inside the automobile and sits down and starts drinking" (T. Tr. 26) and Officer Humphrey didn't arrive until ten minutes later (T. Tr. 26, 27).[3]

At both forums, appellant testified that he never had tried the doors of any cars prior to getting into ("Richard's" or "William's") 1956 Dodge (T. Tr. 27; M. Tr. 18). He further indicated that Officer Humphrey had ordered him out of the car and searched him prior to finding the pistol (T. Tr. 28; M. Tr. 11). Appellant admitted ownership of the gun (T. Tr. 28; M. Tr. 11) and claimed a friend of his had "just pawned it to" him (T. Tr. 28). At the motion to suppress hearing, appellant acknowledged a conviction for unauthorized use of a vehicle in 1959, for unlawful possession of a pistol in 1960 and assault and petty larceny in 1964 (M. Tr. 14, 15).

Both Judges Curran and Corcoran believed Officer Humphrey's description of the events and disbelieved appellant's. The gun was consequently admitted into evidence as having been lawfully seized (M. Tr. 29; T. Tr. 35). The trial court found appellant guilty as charged (T. Tr. 36).[4]

It is from that decision that appellant now appeals.

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[3] Appellant in his statement of the case fails to mention any of these inconsistencies.

[4] At trial it was stipulated that on the day of the offense appellant did not have a license to carry a gun (T. Tr. at 21).

STATUTE INVOLVED

Title 22, District of Columbia Code, Section 3204 provides in pertinent part:

> No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed.

SUMMARY OF ARGUMENT

The decisions of Judges Corcoran and Curran to believe Officer Humphrey's description of the events surrounding appellant's arrest and to disbelieve appellant's description of those events were not "clearly erroneous". At both the motion to suppress hearing before Judge Curran and the trial before Judge Corcoran, Officer Humphrey related with substantial consistency a credible series of events culminating in the seizure of a pistol on appellant's person and his arrest. From the point of initial surveillance through his investigatory response and ultimately the arrest, the officer acted in a considered and reasonable—and believable—manner. The record fails to disclose otherwise.

Moreover, the alternative sequence of events related by appellant is grossly suspect. It contains numerous glaring inconsistencies concerning the owner of the car in which appellant was arrested, his actions in the car prior to the arrest and his initial encounter with the female in whose company he was when arrested. These inconsistencies, viewed in conjunction with appellant's prior criminal record for offenses casting doubt on his truth-telling propensity, and the bizarre circumstances of his tale are surely sufficient to remove his testimony from the realm of common experience and place his credibility severely in question.

The credibility issue was passed on by Judges Curran and Corcoran after full hearings at which both appellant and Officer Humphrey testified. Both Judges believed Officer Humphrey. Appellant, wholly ignoring his own grotesquely inconsistent testimony below, attacks those decisions through rank speculation and through a series of baseless innuendos concerning Officer Humphrey's credibility. Plainly, he has failed to show the decisions of Judges Corcoran and Curran to be "clearly erroneous". They deserve affirmance.

ARGUMENT

The decisions of Judges Corcoran and Curran, as triers of fact, to believe Officer William Humphrey's description of the events surrounding appellant's arrest and to disbelieve appellant's description of those events were not "clearly erroneous". Seized pursuant to a lawful arrest, appellant's pistol was properly admitted into evidence below.

(T. Tr. 6, 7, 8, 9, 13, 14, 15, 16, 17, 25, 26, 27, 30; M. Tr. 6, 7, 8, 12, 14, 15, 16, 19, 20)

Appellant concedes on appeal that if Officer Humphrey's description of the events is believed, as it was in two separate forums below, then a lawful arrest and seizure is made out.[5] His argument is rather that Officer Humphrey's

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[5] Officer Humphrey's conduct—as described by his testimony—was plainly lawful throughout the entire course of the episode. His initial investigatory response was appropriate and well taken. *Liles and Johnson* v. *United States*, D.C. Cir. Nos. 20,807 and 20,808, decided November 16, 1967, slip op. at 3, 4; *Dorsey* v. *United States*, —— U.S. App. D.C. ——, 372 F.2d 928, 931 (1967). In *Dorsey*, this Court stated: "If policemen are to serve any purpose of detecting and preventing crime by being out on the streets at all, they must be able to take a closer look at challenging situations as they encounter them" *Id.* at 931. Officer Humphrey's inchoate attempt to question appellant about the 1956 abandoned Dodge in which appellant and a female companion sat at 5:30 a.m. was justified and considered. *Liles and Johnson* v. *United States, supra*, slip op. at 3. Had Officer Humphrey in fact ordered

testimony was so incredible on its face as to make it plain error for Judges Corcoran and Curran, as triers of fact, to believe Officer Humphrey and disbelieve appellant.

Appellant has a difficult burden to overcome. He must show the decisions of Judges Corcoran and Curran to have been "clearly erroneous". *Jackson* v. *United States*, 122 U.S. App. D.C. 324, 326, 353 F. 2d 862, 864 (1965). To reach such a finding, this Court must be of the opinion, having considered the entire record before both forums below, "that a mistake has been committed" or that "the probability of error is too great to tolerate". *Id.* at 327, 328. When credibility is involved, "this power should be exercised with great caution." *Id.* at 328. We suggest this caution to be particularly appropriate in the present case where not one, but two Judges reached the same factual conclusion after relatively extensive consideration.

At both proceedings Officer Humphrey related with substantial consistency a credible series of events surrounding appellant's arrest.[6] He testified that he first encoun-

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appellant out of the car and prior to appellant's exhibition of the pistol, such investigative conduct would have been perfectly lawful and would in no sense have constituted an arrest. *Liles and Johnson* v. *United States, supra,* slip op. at 3, 4; *Brown* v. *United States,* —— U.S. App. D.C. ——, 365 F.2d 976 (1966).

Appellant, however, got out of the abandoned Dodge at his own behest and in so doing gave Officer Humphrey, standing but a few feet away, a clear view of the butt of a pistol in appellant's right rear pocket. Having seen the pistol, Officer Humphrey had abundant probable cause to arrest appellant and seize the weapon. *Liles and Johnson* v. *United States, supra,* slip op. at 3, 4; *Teresi* v. *United States,* 187 A.2d 492 (D.C. Ct. App. 1963); *Emburgh* v. *United States,* 164 A.2d 342 (D.C. Mun. App. 1960).

[6] The *sole* discrepancy in the testimony offered by Officer Humphrey at the motion to suppress hearing and at trial involves post-arrest statements made by appellant regarding ownership of the vehicle. At the motion to suppress hearing Officer Humphrey testified that appellant did not indicate an owner of the 1956 Dodge after having been arrested (M. Tr. 7). At trial he indicated appellant stated the car belonged to someone in the building nearby (T. Tr. 16). We do not think this discrepancy is material to the issue of the preceding arrest. In any event, it palls by comparison to appellant's incredibly inconsistent description of the events in question such that the trier of fact could properly have believed Officer Humphrey.

tered appellant in the 600 block of Seventh Street, S.E., at 5:00 a.m. on September 2, 1966, during the course of his routine police patrol in an unmarked vehicle (T. Tr. 6). Appellant was in the company of a female. His attention was directed to the two of them because it appeared the female was being restrained in her movement by appellant (T. Tr. 6, 13). Appellant in his brief (App. Br. at 12) speculates that the "interracial" nature of their relationship caused Officer Humphrey to scrutinize their conduct to an exaggerated extent. The record in no way indicates the race of appellant's female companion, Violet Farrell. The sole question therein directed by appellant's counsel at trial to Officer Humphrey *assumes* that Violet Farrell is white (*supra*, f. 1). Further, we fail to understand why —even assuming the record reveals Violet Farrell to be white—Officer Humphrey's categorical denial of this as a motive for surveillance is not dispositive (T. Tr. 13). Appellant's attenuated and unsupported speculations to the contrary (App. Br. at 12-13) and his lurking innuendo that Officer Humphrey wanted to "get something" on appellant (App. Br. at 13) are baseless. Officer Humphrey's subsequent surveillance of appellant and Miss Farrell as they went to a bootleg liquor store and then to a parking lot where appellant tried to find an unoccupied car was surely reasonable. (T. Tr. 7, 8, 9, 16; M. Tr. 6, 7, 8).

Officer Humphrey observed appellant and Miss Farrell enter an abandoned 1956 Dodge. As he approached to investigate, appellant got out of the car and faced him at a distance of two or three feet. As appellant was getting out of the car, his shirt pulled up over his waist revealing a pistol in his back pocket which Officer Humphrey immediately seized. (T. Tr. 9, 14, 15, 16, 17; M. Tr. 7, 8). To this sequence of events, appellant offers the contents of PD-163 (App. Br. at 14) purporting to show that Officer Humphrey conducted a "further investigation" of appellant—a search—before seeing the gun.[7] We note that the

[7] PD-163 itself was never made a part of the record at trial. We take it, however, that insofar as its contents concerning the seizure

transcript reference to PD-163 contains no such statement. Further, we think PD-163 itself is clear that Officer Humphrey first saw the gun, and then conducted his "further investigation":

> "As the above officer approached the defendant [appellant] he observed what appeared to be the but (sic) of a pistol protruding from defendant's [appellant's] right rear trousers pocket. *Upon further investigation* it was revealed that the defendant possessed a .32 caliber Omega revolver, black steel in color, with white plastic grips, bearing the serial number 11579."

Appellant's statement that "the officer admitted that in PD-163 he stated that he discovered the gun 'upon further investigation' " (App. Br. at 14) is plainly incorrect.[8]

Appellant's other appellate attacks on Officer Humphrey's credibility are equally unfounded. With no support whatsoever, he makes the following allegations:

> "His [Officer Humphrey's] interest in sustaining a good reputation should not be under-estimated as a motive to exaggerate a few facts" (App. Br. at 11).
>
> ". . . Lieutenant Humphrey's legal sophistication would facilitate a fairly expert exaggeration of the facts" (App. Br. at 12).

These veiled innuendos directed at Officer Humphrey's character are, generously put, false. Further, it is clear

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of the weapon were referred to, PD-163 was to that extent incorporated into the record of the proceedings below.

[8] Appellant makes a last-ditch allegation supported by neither reasoning nor case authority that Violet Farrell's arrest was illegal (App. Br. at 16). The law in this jurisdiction is clear, however, that Officer Humphrey's conduct in ordering Violet Farrell out of the abandoned Dodge after having arrested appellant was a reasonable investigative measure and in no way constituted an arrest. *Liles and Johnson, supra*, slip. op. at 3, 4; *Brown* v. *United States, supra* at 876; *Green* v. *United States*, No. 4238, D.C. Ct. App., October 18, 1967; *Perry* v. *United States*, 230 A.2d 721 (D.C. Ct. App. 1967); *White* v. *United States*, 222 A.2d 843 (D.C. Ct. App. 1966). *Cf. Mincy* v. *District of Columbia*, 218 A.2d 507 (D.C. Ct. App. 1966). See also, *Hall* v. *United States*, D.C. Ct. App., December 12, 1967.

that Judges Corcoran and Curran, as triers of fact, could properly take into account appellant's own "vital interest" in the outcome of the trial in passing on his credibility. *Reagen* v. *United States*, 157 U.S. 301, 304 (1895); *Fisher* v. *United States*, 80 U.S. App. D.C. 96, 149 F. 2d 28 (1945), *aff'd*, 328 U.S. 462 (1948); *Shettel* v. *United States*, 72 U.S. App. D.C. 250, 113 F. 2d 34 (1940).

Appellant makes much of the fact that he was not charged with tampering (App. Br. at 13). We think it clear that, whatever the reason for the failure to charge and prosecute appellant on this count, it was discretionary with the United States Attorney and cannot now be made to reflect adversely on Officer Humphrey. *Newman* v. *United States*, D.C. Cir. No. 20,637, decided July 31, 1967, slip op. at 3; *Epperson* v. *United States*, —— U.S. App. D.C. ——, 371 F. 2d 956, 958 (1967).

Appellant's conclusory contention that Officer Humphrey's testimony was not credible in the light of ordinary experience (App. Br. at 11, 15) is absurd. We think it clear that from the point of initial surveillance to arrest, Officer Humphrey acted in a considered and reasonable—and believable—manner. Moreover, the alternative sequence of events related by appellant—which appellant must press as comporting more with common experience than those related by Officer Humphrey—is grossly suspect. At 4:30 a.m. in the morning appellant happened to encounter a friend on the street. Depending on whether one looks at the motion to suppress or the trial, the friend was either on his way to work or on his way home to his wife (Tr. 26; M. Tr. 19). Either way, appellant by his own testimony offered to do a favor for his friend's companion, and athough he didn't know her he agreed to take her to a local bootleg establishment. (M. Tr. 15, 19, 20). There he bought a bottle of liquor for her which she placed in her bosom as the two of them allegedly walked directly to an empty car of which appellant knew. (T. Tr. 26; M. Tr. 15). Appellant testified initially that the car belonged to one "Richard" whose last name he didn't know,

but whose apartment he knew the location of (M. Tr. 16). At trial, appellant referred over and over to "William" as the car's owner again with the same inadequate recollection of surname (T. Tr. 26, 30). Finally appellant described the events inside the car with gross inconsistency, first claiming no drinking occurred and Officer Humphrey arrived immediately (M. Tr. 12), and then claiming he and Miss Farrell drank gin for ten minutes before Officer Humphrey arrived (T. Tr. 26, 27). These glaring inconsistencies, viewed in conjunction with appellant's prior criminal record for offenses of a moral nature (M. Tr. 14, 15) and the bizarre circumstances of his tale are surely sufficient to remove his testimony from the realm of common experience and knowledge and place his credibility severely in question.

The credibility issue was passed on by Judges Curran and Corcoran after full hearings at which both appellant and Officer Humphrey testified. Both Judges—having observed the demeanor of the two witnesses—believed Officer Humphrey. Appellant, wholly ignoring his own grotesquely inconsistent testimony below, now attacks those decisions through rank speculation and through a series of baseless innuendos concerning Officer Humphrey's credibility. Plainly appellant has not shown the decisions of Judges Curran and Corcoran to be "clearly eroneous". They deserve affirmance.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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